90-269

NUMBER _____

UNITED STATES SUPREME COURT

OCTOBER, 1990 TERM

KAREN R. LUNDE,

APPELLANT

vs.

CHARLES M. HELMS, ET AL,

APPELLEES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL D. LUNDE, ATTORNEY
COUNSEL OF RECORD FOR
KAREN R. LUNDE
P. O. BOX 565--604 FIFTH ST.
AMES, IOWA 50010
(515) 232-9900 or 292-8233

QUESTIONS PRESENTED FOR REVIEW

I. Can the case of a Federal civil rights plaintiff be put on a stay of indefinite duration without any showing of exceptional circumstances?

II. Can a Federal court refuse to hear the merits of a civil rights case by putting it on a stay of indefinite duration, while at the same time saying that it is not dismissing the case on abstention grounds?

III. Does a U. S. Court of Appeals lack jurisdiction to review orders of a district court putting the case of a Federal civil rights plaintiff on a stay of indefinite duration without a showing of exceptional circumstances?

LIST OF PARTIES TO THE PROCEEDING

Karen R. Lunde, Plaintiff-Appellant.

Charles M. Helms, Associate Dean for Student Affairs and Curriculum, College of Medicine, University of Iowa;

John W. Eckstein, Dean of the College of Medicine, University of Iowa;

College of Medicine, University of Iowa;

Hunter R. Rawlings, III, President, University of Iowa;

Jerald W. Dallam, Registrar, University of Iowa;

The University of Iowa, State of Iowa, Defendants-Appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

REFERENCES TO REPORTS OF THE OPINIONS DELIVERED IN THE CASE BY OTHER COURTS:

Lunde v. Helms is reported at 898 F.2d 1343 (8th Cir., 1990).

Note: an earlier appeal, also titled Lunde v. Helms, is reported as a case without published opinion, No. 89-1558, 894 F.2d (8th Cir., 1989). It is not involved here.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Date of the judgment or decree sought to be reviewed, and the time of its entry: Per Curiam decision filed March 23, 1990.

The date of any order respecting a rehearing: Appellant's suggestion for rehearing en banc denied; Petition for rehearing by the panel also denied; May 14, 1990.

The date and terms of any order granting an extension of time within which to petition for writ of certiorari: None.

The statutory provision believed to confer on this Court jurisdication to review the judgment or decree in question by writ of certiorari: Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of any State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

42 U. S. Code, Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

20 U. S. Code, Sec. 1681:

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ***

STATEMENT OF THE CASE

Approximately one year ago, on August 31, 1989, the case of a Federal civil rights plaintiff was put on a stay of indefinite duration by a U. S. District Court, without the exceptional circumstances showing required by the Supreme Court in Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). It happened this way:

At the time this case commenced in U. S. District Court for the Southern District of Iowa, Central Division, on February 15, 1989, Karen R. Lunde was a third-year medical student in the University of Iowa College of Medicine, Iowa City, Iowa. She was making passing grades in all of her

medical school subjects; nevertheless, the College of Medicine was threatening to cancel her medical school registration. She brought suit for injunctive and declarative relief, attempting to continue her medical school studies while litigating her claims that she was the victim of violations of her constitutional rights (First and Fourteenth Amendments, U. S. Constitution) and of her right to be free of illegal sexual discrimination.

Karen R. Lunde had entered the University of Iowa College of Engineering at the age of 16, right out of high school, in the fall of 1981; on May 18, 1985, she received the Bachelor of Science Degree with honors (Highest Distinction), with a major in biomedical engineering. She then

entered the University of Iowa College of Medicine, where she received passing grades in her first two years. In her third year, she was placed on academic probation due to evaluations which she claims were tainted by illegal sexual stereotyping of the type involved in the case of Price Waterhouse v. Hopkins, 490 U. S._____, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). She spent one semester taking more undergraduate courses, then returned to her medical studies, repeating some courses as she was required to do, some of which she had previously passed. While repeating a course in clinical pediatrics which she had previously taken with a passing grade, she encountered one doctor who apparently did not like her; he told her that he did not like something she

had said and that he, accordingly, was going to submit a failing grade for her. His action eventually led to a failing grade in the pediatrics course which, in turn, led to an administrative proceeding threatening her status as a medical student. Her attorney, on Feb. 1, 1988, filed suit for injunctive and declarative relief on her behalf in the U. S. District Court for the Southern District of Iowa. That suit was voluntarily dismissed when medical school officials promised to reconsider her case. However, when the same result was again threatened, a few days later, her attorney on Feb. 15, 1989 filed the present suit, alleging violations of her civil rights (violations of her rights under the First and Fourteenth Amendments, U. S. Constitution, and

illegal sex discrimination under Title IX of the Education Amendments of 1972, Title 20, U. S. Code, Chap. 38, Sec. 1681, as amended by the Civil Rights Restoration Act of 1987) and seeking injunctive and declarative relief under the Civil Rights Act of 1871, 42 U.S. Code Chap. 21, Sec. 1983.

The U. S. District Court for the Southern District of Iowa denied a temporary injunction and Plaintiff's medical school registration was then immediately cancelled by Defendants.

Seeking a preliminary injunction, Plaintiff presented evidence that the entire administrative procedure against her had been illegal under governing State law (Chapter 17A, Iowa Code, the Iowa Administrative Procedure Act), and therefore violative of Karen R. Lunde's

Fourteenth Amendment rights to due process and equal protection of State law. She had been denied a contested case hearing, denied assistance of counsel, denied the right to call and cross examine witnesses, denied a transcript, and denied all other elements of procedural due process as required by Ch. 17A, Code of Iowa. At the present time, the appeal of her Iowa administrative case is scheduled to be heard by the District Court of Iowa in and for Polk County on Aug. 27, 1990.

The U. S. District Court denied a preliminary injunction. As relevant here, the Court on March 22, 1989 heard evidence regarding a motion to dismiss on abstention grounds, filed by Defendants, and on a motion for rehearing, etc., filed by Plaintiff.

On March 30, 1989, the U. S. District Court issued an order denying Plaintiff's motion and deferring a decision on the motion to dismiss pending the filing of further briefs, due on April 17, 1989. On June 30, 1989, the U. S. District Court issued an order calling for the filing of additional briefs regarding the motion to dismiss and set an additional evidentiary hearing on the issues of equitable estoppel and application of the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971).

Plaintiff on July 3, 1989 had subpoenas served on seven witnesses, including the four named individual Defendants, ordering them to appear to testify and bring with them certain documents for introduction as evidence. How-

ever, just before the scheduled hearing date (Aug. 17, 1989), the Court, at the request of the Defendants, ordered the subpoenas quashed.

On August 15, 1989, Plaintiff filed an amended complaint in which she added a jury trial damages issue against the four individual Defendants (ultimately under 42 U.S.C. Sec. 1983), citing Cannon v. University of Chicago, 441 U.S. 675 and Price Waterhouse v. Hopkins, 490 U.S. _____, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989), if the Court refused her request for injunctive relief that would restore her medical student status.

On August 17, 1989, the District Court held a hearing at which three witnesses called by the Defendants testified; one of them, the Defendant

Charles M. Helms, was one of the seven witnesses that Plaintiff had attempted to subpoena.

On August 31, 1989, the District Court issued the Order which is the subject of this appeal. In its Order, the District Court denied the motion to dismiss on Younger abstention grounds and then proceeded to stay further Federal proceedings until the final disposition of proceedings before the State of Iowa Board of Regents, and any subsequent proceedings authorized by Iowa statutes, including judicial review proceedings in the Iowa courts. In his order staying further proceedings, the District Court did not include any "exceptional circumstances" showing to justify the stay, which he ordered sua sponte, over Plaintiff's objections.

ARGUMENT

Plaintiff-Appellant Karen R. Lunde contends the Court of Appeals for the Eighth Circuit, in deciding this case, 898 F.2d 1343, decided a federal question in a way that conflicts with applicable decisions of this Court and in conflict with decisions of other U. S. Courts of Appeal on the same matter.

I. THE COURT OF APPEALS WAS IN ERROR IN CONCLUDING IT LACKS JURISDICTION WITH RESPECT TO THE DISTRICT COURT'S ORDER STAYING THE FEDERAL CASE PENDING RESOLUTION OF THE STATE ADMINISTRATIVE AND JUDICIAL REVIEW PROCEEDINGS.

The following decisions by this Court are believed to be controlling: Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460

U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); New Orleans Public Service v. Council of City of New Orleans, 490 U.S._____, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); and England v. Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

This Court settled the question as to whether an indefinite stay order is appealable in Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

The case of Cheyney State College Faculty v. Hufstedler, 703 F.2d 732 (3rd Cir., 1983) cited by the Eighth Circuit is not controlling precedent and, in fact, cites and purports to follow Moses H. Cone, supra. See 703 F.2d 732, 735. Furthermore, Cheyney State is easily

distinguishable from the instant case; there, as the Court pointed out,

> ... the stay order by its terms requires defendants to report within 90 days on the progress of the proceedings in the U. S. Department of Education. The district court's determination to reconsider its order on that date shows that the stay is simply a tentative step toward final disposition of the merits. (Citation omitted). We also construe the court's order as stating an intention to monitor the stay periodically. (703 F.2d 73, at 735-736).

Here, on the other hand, there was no requirement that the defendants report in 90 days or at any other time,

and there is nothing in the court's order to indicate an intention to monitor the stay periodically. Indeed, the length of the stay is indefinite, the order does not include the necessary "exceptional circumstances" analysis, and it is clearly violative of this Court's decision in Moses H. Cone, supra. Under these circumstances, the Court of Appeals decision in the instant case to the effect that the district court's order is not appealable is in error and inconsistent with the Moses H. Cone precedent.

The Eighth Circuit's decision in the instant case is also inconsistent with other recent decisions in other circuits. For example, in CECOS International, Inc. v. Jorling, 895 F.2d 66 (2nd Cir., 1990), the Second

Circuit held that the district court did have jurisdiction, in a declaratory judgment proceeding under 42 U.S.C. Sec. 1983, citing Moses H. Cone:

> To begin, federal courts have an unflagging obligation to adjudicate cases brought within their jurisdiction. It is now black-letter law that abstention from the exercise of federal jurisdiction is the narrow exception, not the rule. 895 F.2d 66, at 70.

In the instant case, the Eighth Circuit cited Moses H. Cone in support of its decision that

> We ... lack appellate jurisdiction over the order staying the federal case pending resolution of the on-going state ad-

ministrative and judicial review proceedings.

One of these cases is clearly wrong. The Moses H. Cone precedent cannot support the Second Circuit decision in CECOS International and, at the same time, the decision of the Eighth Circuit in the instant case. This Court should grant certiorari in the instant case and resolve the obvious conflict between the circuits, in accordance with the considerations set forth in Supreme Court Rule 10.1(a) and (c).

II. THE COURT OF APPEALS APPARENTLY FAILED TO NOTE THAT THE FEDERAL CASE IS AN INDEPENDENT PROCEEDING AND, AS SUCH, MUST BE ALLOWED TO PROCEED WITHOUT REGARD TO THE STATE ADMINISTRATIVE CASE.

Under the doctrine of England v. Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), Plaintiff-Appellant has elected to litigate her 42 U.S.C. Sec. 1983 case in the Federal forum, as she has a right to do. See, e.g., CECOS International, Inc. v. Jorling, 895 F.2d 66, 72 (2nd Cir., 1990) and cases cited therein. Plaintiff-Appellant has given appropriate notice of her election to litigate her 42 U.S.C. Sec. 1983 case in the Federal forum; she brought this to the specific attention of the Court of Appeals. Plaintiff-Appellant has been the victim of violations to her rights to freedom of speech (First Amendment) and to her rights to be free of illegal sexual discrimination (Fourteenth Amendment; 42 U.S.C. Sec. 1983; 20 U.S.C. Sec.

1681); she has a right to seek vindication in the Federal forum. In accordance with her amended petition, Plaintiff is supposed to have a jury trial on her damages complaint if the Federal court refuses the requested injunctive relief; the district court's stay order has effectively prevented Plaintiff, for nearly a year, from litigating her 42 U.S.C. Sec. 1983 damages claim against the four individual defendants. The district court's stay order amounts to a denial of Plaintiff's constitutional rights to due process of law, guaranteed to her by the Fifth and Fourteenth Amendments, U. S. Constitution.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

KAREN R. LUNDE,	)	
Plaintiff	)	CIVIL NO.
vs.	)	89-128-A
CHARLES M. HELMS, et al.,	)	ORDER
Defendants.	)	

This is the second of two complaints plaintiff has filed this year seeking injunctive and declaratory relief against the president and other officials of the University of Iowa, arising from her dismissal from the University of Iowa College of Medicine during her third year of studies. On February 3, 1989, at the commencement of a hearing on her request for a preliminary injunction, she dismissed without prejudice her first complaint filed on February 1, 1989. She filed

this second action on February 15, 1989. After a hearing on her new request for a preliminary injunction, the court on February 16, 1989, denied injunctive relief, concluding that on balance the so-called Dataphase factors (Dataphase Systems, Inc. v. C. L. Systems, 640 F.2d 109 (8th Cir. 1981)) required the court to refrain from intervening with injunctive relief at that time. Plaintiff has appealed that ruling.

Since then the court has held two evidentiary hearings on the plaintiff's renewed motion for preliminary injunction and the defendant's motion to dismiss the complaint as amended. At the second hearing held on August 17, 1989, the plaintiff also asked this court to disqualify counsel for the

defendants. The court has now received additional briefs and other papers from the parties, and all pending motions are ready for ruling.

Motion to Disqualify Counsel. During the hearing on August 17, 1989, plaintiff asked the court to prohibit defense counsel in this case from providing legal advice to the Iowa Board of Regents that currently has under consideration plaintiff's administrative challenge to her dismissal from medical school. She contends counsel has a conflict of interest, in that the Iowa Board of Regents should be neutral in determining whether the dismissal was correct, while the defendants in this case are defending the dismissal as correct. Plaintiff has not demonstrated that defense counsel, attorneys

assigned by the Iowa Attorney General, have compromised the neutrality of the Board of Regents; neither has she demonstrated that defense counsel have acted unprofessionally in any respect. Plaintiff has cited no case authority in support of her position. The court concludes the office of the Iowa Attorney General has simply been performing its statutory duties in representing the defendants here, as well as representing the Iowa Board of Regents. See Iowa Code Sec. 13.2 (1989). The motion to disqualify counsel is denied.

Renewed Motion for Preliminary Injunction. Plaintiff renews her application for injunctive relief "to restore plaintiff's status as a medical student in the University of Iowa College of Medicine." The court has re-

viewed the entire record in this case and applied to the facts the appropriate factors set forth in Dataphase. On balance, those factors plainly require that this court refrain from changing the status quo in any way by granting preliminary injunctive relief. The renewed request for injunctive relief is denied.

Motion To Dismiss Amended Complaint. Defendants originally moved to dismiss plaintiff's complaint on the grounds that (1) abstention is required under Younger v. Harris, 401 U.S. 37 (1971), and (2) the complaint failed to state a claim of sex discrimination or any due process violation on which relief could be granted. With plaintiff having amended her complaint to seek a money judgment for damages, defendants

also have moved to dismiss that claim for the same reasons.

The claims for relief are adequately pleaded and will not be dismissed as failing to state grounds for relief. This ruling in no way suggests, however, that plaintiff will prevail on the merits of her claims. Courts are not well suited to evaluate academic decisions that "require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making." Regents of University of Michigan v. Ewing, 474 U.S. 523, 533, citing Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 89-90 (1978). Important state interests are implicated in allowing professional university administrators and faculty

persons to determine who are meeting academic standards. Id.; see Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 627 (1986). Although plaintiff contends defendants have not followed the Iowa Administrative Procedure Act (Iowa Code ch. 17) and certain internal university procedures, plaintiff presented no basis in law or fact for that contention. Iowa has a legitimate interest in the quality of health care provided to its citizens, as well as the determination what students should be selected for and retained in programs at the Regent's universities. On the record now before this court after two evidentiary hearings, plaintiff has entirely failed to demonstrate that defendants have acted unlawfully or in bad faith

toward the plaintiff.

Ultimately, plaintiff may be able to flesh out her assertions that defendants have violated her rights under the United States Constitution and certain federal civil rights statutes. This court may retain jurisdiction of this case to provide an appropriate forum if State administrative and judicial proceedings do not protect her fundamental rights.

While the court would have discretion to grant defendants' motion to dismiss based on Younger abstention, the court exercises its discretion instead to stay further proceedings in this court pending the outcome of administrative and State judicial proceedings concerning plaintiff's challenge to her dismissal from medical school. The

stay will be in effect until the final disposition of proceedings before the Iowa Board of Regents, and any subsequent proceedings authorized by Iowa statutes, including judicial review proceedings in the Iowa courts. See Ronwin v. Dunham, 818 F.2d 675 (8th Cir. 1987).

This court will lift this stay and hold further proceedings in this action if, on application and notice to defendants, the plaintiff demonstrates that any administrative and judicial proceedings plainly infringe the constitutional rights or federal statutory rights of the plaintiff in respects that the State judiciary cannot or will not address and remedy.

IT IS SO ORDERED.

Dated this 31st day of August, 1989.

(signed) Charles R. Wolle, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2489

Karen R. Lunde,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
Charles M Helms, Associate Dean for Student Affairs and Curriculum, College of Medicine, University of Iowa; John W. Eckstein, Dean of the College of Medicine, University of Iowa; Hunter R. Rawlings III, President, University of Iowa; Jerald W. Dallam, Registrar, University of Iowa; and the University of Iowa, State of Iowa,	*	Appeal from the United States District Court for the Southern District of Iowa
Appellees.	*	

Submitted: October 6, 1989
Filed: March 23, 1990

Before LAY, Chief Judge, and McMILLIAN and WOLLMAN, Circuit Judges.

PER CURIAM.

Karen R. Lunde appeals from several orders entered in the District Court for the Southern District of Iowa denying her request for preliminary injunctive relief, denying her motion to disqualify defense counsel, and staying proceedings in federal court pending disposition of certain on-going state administrative and judicial proceedings. For the reasons discussed below, we hold that we lack jurisdiction to review the orders denying the motion to disqualify counsel and staying proceedings in federal court and dismiss that part of the appeal for lack of jurisdiction. Treating this part of the appeal as a petition for writ of

mandamus, we hold that the district court did not abuse its discretion in denying the motion to disqualify or in granting the stay. We also hold that the district court did not abuse its discretion in denying preliminary injunctive relief and accordingly affirm that part of the appeal.

Plaintiff was a third-year medical student. According to defendants, she was dismissed for poor clinical performance. In February 1989 plaintiff filed a 42 U.S.C. Sec. 1983 complaint against defendants seeking declaratory and injunctive relief. She alleged that she had been wrongfully dismissed. Plaintiff dismissed her initial complaint and refiled, alleging sex discrimination. On February 16, 1989, the district court denied her request for

a preliminary injunction. Defendants then filed motions to dismiss. Plaintiff filed a Fed. R. Civ. P. 60(b) motion on the ground of fraudulent misrepresentation and a second request for preliminary injunctive relief. On March 30, 1989, the district court denied the Rule 60(b) motion. Plaintiff filed a notice of appeal on April 4, 1989.

On May 4, 1989, this court dismissed as untimely filed that part of the appeal involving the denial of preliminary injunctive relief but permitted the appeal from the denial of the Rule 60(b) motion to proceed. On December 7, 1989, this court affirmed the district court's denial of the Rule 60(b) motion. Lunde v. Helms, No. 89-1558 (8th Cir. Dec. 7, 1989)

(per curiam).

In the meantime, in August 1989, plaintiff filed an amended complaint alleging that she had been discriminated against because of her sex, dismissed from medical school as punishment for exercising her first amendment rights, and denied due process. She again sought declaratory and injunctive relief as well as monetary damages. She specifically renewed her request for preliminary injunctive relief and sought to disqualify defense counsel on the ground of conflict of interest. On August 31, 1989, the district court denied the motion to disqualify counsel, denied preliminary injunctive relief, denied defendants' motion to dismiss, and stayed the case pending resolution of the on-going

state administrative and judicial review proceedings. This appeal followed.

MOTION TO DISQUALIFY COUNSEL

We lack appellate jurisdiction over the order denying the motion to disqualify counsel. Such an order is not final and does not fall within the collateral order exception. See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-79 (1981). We dismiss this part of the appeal for lack of jurisdiction. Treating this part of the appeal as a petition for writ of mandamus, we hold there are no exceptional circumstances which warrant extraordinary relief and deny the petition for writ of mandamus. See In re Ford Motor Co., 751 F.2d 274, 275-77 (8th Cir. 1984).

STAY OF FEDERAL PROCEEDINGS

We also lack appellate jurisdiction over the order staying the federal case pending resolution of the on-going state administrative and judicial review proceedings. An order staying civil proceedings is interlocutory and not ordinarily a final decision for purposes of 28 U.S.C. Sec. 1291. See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 10-11 n.11 (1983); Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 735 (3d Cir. 1983) (Cheyney State). "When a stay amounts to a dismissal of the underlying suit, however, an appellate court may review it . . . .An indefinite stay order that unreasonably delays a plaintiff's right to have his [or her] case heard is appealable." Cheyney State, 703 F.2d at 735. "[D]etermina-

tion of the finality--and therefore the appealability--of the [district court order] first requires that we determine the substance of what was intended." Brace v. O'Neill, 567 F.2d 237, 242 (3d Cir. 1977).

Although the stay in the present case is on its face indefinite in duration, the order contemplates further proceedings in federal court and thus does not have the practical effect of a dismissal. We think this stay merely temporarily suspended the federal case. See Cheyney State, 703 F.2d at 735-36 (stay pending federal administrative proceedings). The district court stayed the federal case until resolution of the on-going state administrative and judicial review proceedings in which plaintiff was challenging

her dismissal from medical school. The district court order in fact leaves open the possibility that the stay could be vacated if plaintiff demonstrated that her federal constitutional or statutory rights would be infringed by or cannot be addressed in the on-going state proceedings.

Treating this part of the appeal as a petition for writ of mandamus, we hold the district court did not clearly abuse its discretion in staying the federal case pending resolution of the on-going state proceedings. In our view, this is a matter of docket management. Id. at 737-38, citing Landis v. North American Co., 299 U.S. 248, 254-55 (1936) (power to stay proceedings incidental to power inherent in every court to control docket).

DENIAL OF PRELIMINARY INJUNCTIVE RELIEF

We do have appellate jurisdiction to review the order denying preliminary injunctive relief. 28 U.S.C. Sec. 1292(a)(1); see, e.g., Educata Corp. v. Scientific Computers, Inc., 746 F.2d 429, 430 (8th Cir. 1984) (per curiam). The order on appeal in the present case is the March 30, 1989, order, not the February 16, 1989, order. The district court reviewed the record, applied the test set forth in Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981) (banc) (Dataphase), and found (admittedly summarily) that, on balance, the Dataphase factors did not require judicial intervention to change the status quo by reinstating plaintiff as a medical student until the merits could be determined. We

have reviewed the record and hold the district court did not abuse its discretion in denying preliminary injunctive relief.

Accordingly, the parts of the appeal challenging the district court orders denying the motion to disqualify counsel and staying the federal case are dismissed for lack of jurisdiction. Those parts of the appeal have also been treated as petitions for writs of mandamus and are denied. The district court order denying preliminary injunctive relief is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2489SI

Karen R. Lunde,	*
	*
Appellant,	*
	* Order Denying
v.	* Petition For
	* Rehearing and
Charles M. Helms, et al,	* and
	* Suggestion
Appellees.	* For
	* Rehearing
	* En Banc.

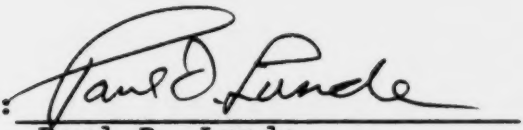
Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

May 14, 1990

Order entered at the direction of the Court: Robert D. St. Vrain, Clerk, U. S. Court of Appeals, Eighth Circuit.

SIGNATURE OF COUNSEL OF RECORD

Signed by: 

Paul D. Lunde
P. O. Box 565
Ames, Iowa 50010
(515) 232-9900
or 292-8233

A member of the Bar of this Court.